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No. 964

Supreme Court of the United States

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 964

SINCLAIR REFINING COMPANY,

Petitioner,

v.

S. KRIETE OSBORN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The questions presented are:

1. Whether the use by the Petitioner of its economic power over service stations which it leased to dealers so as to cause the dealers to purchase products marketed by Goodyear Tire and Rubber Company rather than competing brands constituted a monopolization or attempt to monopolize any part of interstate commerce in violation of Section 2 of the Sherman Act.

2. Whether such use by the Petitioner of its economic power over the service stations was the result of a contract or conspiracy with Goodyear Tire and Rubber Company to restrain interstate commerce in violation of Section 1 of the Sherman Act or to monopolize any part of interstate commerce in violation of Section 2 of the Sherman Act.

STATEMENT OF THE CASE

Petitioner, Sinclair Refining Company ("Sinclair"), is a producer and distributor of petroleum products in interstate commerce. It sells these products to various outlets, including service station dealers, some of whom lease their stations from Sinclair (R. 17, 20).* Prior to January 1, 1956 it conducted its operations in Maryland through a wholly owned subsidiary, Sherwood Brothers, Inc., which was merged into Sinclair on December 30, 1955 (R. 17). After the merger Sinclair's operations in Maryland were conducted through its Sherwood Division ("Sherwood").[1] Respondent, S. Kriete Osborn ("Osborn") was one of Sherwood's lessee dealers in Maryland.

Service station dealers are primarily engaged in selling gasoline, but also sell tires, batteries, accessories and other merchandise ("TBA") (R. 17). All of the TBA marketed by Goodyear Tire and Rubber Company ("Goodyear") and a substantial part of the TBA competitive with the Goodyear TBA is shipped into Maryland for resale (R. 28, 74). In many instances the TBA marketed by Goodyear con-

* As used in this Brief, "R" refers to the appendix record below (Vol. 1 of the Transcript of Record certified to this Court), and "Tr." refers to the stenographic transcript.

[1] In the opinions below the term "Sherwood" is used interchangeably to refer to both the subsidiary and the division, and the term "Sinclair" is used to refer to the entire enterprise.

sisted of merchandise which was manufactured and sold under the tradenames of other well known manufacturers, such as DuPont, who also marketed through independent sources (R. 41).

Since 1944 Sinclair has been a party to written agreements with Goodyear with respect to the marketing of Goodyear TBA to Sinclair's dealers (R. 22-23). One agreement (the "tire and battery letter") provided for the purported sale by Goodyear to Sinclair of tires, tubes and batteries for sale by Sinclair through its company operated outlets and for resale to resellers handling Sinclair's petroleum products (R. 22, 80). The other agreement (the "car and home letter") provided for the payment of commissions by Goodyear to Sinclair on sales of merchandise by Goodyear to resellers of Sinclair petroleum products (R. 22). From 1944 until the merger Sherwood Brothers, Inc. was a party to an agreement with Goodyear under which Goodyear agreed to pay commissions to Sherwood on sales of TBA by Goodyear to resellers of petroleum products purchased from Sherwood (R. 21, 24). The functions of Sinclair and Sherwood under these agreements were substantially the same, and consisted of promoting the sale of Goodyear TBA to the Sinclair service station dealers and particularly the lessee-dealers (R. 21-22, 24-25).[2] Sinclair never attempted to and did not engage in the business of selling or promoting the sale of TBA to any one other than its service station dealers, and the

[2] Although the several agreements referred to all resellers of Sinclair gasoline, as a practical matter sales of TBA were limited to lessee-dealers, and dealers who controlled their own stations were not an important factor and "very, very seldom has a big station, because we (Sinclair) take him off the market, or some company takes him off the market if he is that big, and takes him on a lease" (Tr. 1073).

various agreements with Goodyear dealt only with sales to Sinclair service station dealers (R. 28).

Sherwood had a staff which specialized in the TBA field (R. 26). Quotas were established on a sales territory basis and the salesmen discussed volume of Goodyear TBA sales with the dealers (R. 26). Records were kept as to Goodyear TBA purchases, and this information was considered each year in connection with the annual renewals of the leases (R. 26-27). Reports were also prepared as to competitive brands of TBA which were carried by the service station dealers (R. 27). Dealers were requested to remove signs advertising TBA which was competitive with Goodyear TBA (R. 31). Prospective lessees were informed that there was a general identity between the names of Sinclair and Goodyear across the country and that Sherwood liked these names to be held together, and under the normal procedure the Sherwood-Sinclair sales representative would endeavor to secure the initial TBA order at the time the lease and dealer sales agreement was executed (R. 30).

There were a number of instances of specific coercive conduct by Sherwood. These included statements by the President of Sherwood at dealer meetings that Sherwood wanted a million dollars' of TBA per year, and that unless more Goodyear TBA was purchased some leases would be cancelled (R. 33-34). The first lease with Osborn was cancelled in 1948, and the second lease (the cancellation of which in 1956 lead to the present suit) was entered into after Osborn promised to give an order for Goodyear TBA (R. 34). Osborn was also told by a Sherwood sales representative that one way Sherwood expected to recoup the cost of rebuilding the service station which was leased to Osborn was by Osborn handling more Goodyear TBA (R. 35).

The sales of Goodyear TBA on which Sherwood received commissions amounted to $730,180 in 1948 (R. 29). In the following year they dropped to $549,440 after which they increased until 1958, when such sales amounted to $1,052,000 (R. 29).[3] These sales amounted to from 43.2% to 61% of the total quantity of TBA (regardless of brand) which Sherwood estimated would be purchased by the Sherwood-Sinclair service station dealers (R. 28-30). Nearly all of the Sherwood-Sinclair stations handled some Goodyear TBA, but none handled Goodyear TBA exclusively (R. 30).

Osborn first entered into a lease with Sherwood in 1936 (R. 18). This lease was cancelled in 1948 because of a decline in gasoline gallonage and because Osborn was not handling enough Goodyear TBA (R. 19, 34). A second lease was entered into in 1948, after Osborn promised to give an order for Goodyear TBA (R. 34). Osborn purchased much more Firestone TBA than Goodyear TBA, and this fact was considered by the Sherwood sales representative in recommending whether the lease to Osborn should be renewed or terminated and was also considered by the Sherwood sales manager in determining whether the lease should be terminated or renewed (R. 36-37). The second lease was cancelled in 1956 because of dissatisfaction with gasoline gallonage and with the purchases of Goodyear TBA (R. 40). Neither factor was predominant. Osborn was injured as a result of the cancellation (R. 43).[4]

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[3] After 1955, the Goodyear TBA sales included both the sales on which commissions were paid and the sales to Sinclair under the tire and battery letter.

[4] At a pre-trial conference it was agreed that evidence as to the *amount of damages* would not be offered until after a determination of whether there was any violation of the anti-trust laws (Appendix B to Petition for Writ of Certiorari, p. 14a).

The complaint as amended charged three distinct violations of the anti-trust laws by Sinclair, namely:

1. Conspiring or contracting with Goodyear to restrain commerce in TBA in violation of Section 1 of the Sherman Act;

2. Monopolizing or attempting to monopolize that part of commerce which consisted of TBA for sale to Sinclair's service station dealers and particularly to dealers at stations leased from Sinclair, in violation of Section 2 of the Sherman Act; and

3. Making sales of petroleum products and leases of service stations on the condition that Goodyear TBA be purchased, in violation of Section 3 of the Clayton Act.

There was no evidence in the case of any conduct by Sinclair in violation of Section 3 of the Clayton Act which would not also have violated the Sherman Act. Furthermore, the principal damages to Osborn flowed from the cancellation of the lease and the refusal of Sinclair to deal further with him, which would not involve a violation of Section 3 of the Clayton Act (which deals only with actual sales, leases or contracts to sell chattels, and is not concerned with transactions in real property or refusals to enter into contracts), but would involve violations of the Sherman Act. Under these circumstances the Respondent advised the District Court that he was not asserting any independent claim under the Clayton Act, and was limiting his claims to assertions that there were violations of the Sherman Act.[5]

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[5] See Tr. 896. See also the opening arguments before the District Court, and particularly Tr. 19 and 23-25, which clearly show that this case was premised on the decisions in *United States v. General Motors Corporation*, 121 F. 2d 376 (C.C.A. 7, 1941) and *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1957).

The District Court held that Sinclair did not violate the Sherman Act. The rationale of its decision was that (1) the written agreements between Sherwood-Sinclair and Goodyear and between Sherwood-Sinclair and the dealers did not contain any express provisions which were clearly restraints of trade or attempts to monopolize; (2) therefore, the requisite intent to monopolize or restrain trade must be determined from the way in which the agreements were used; (3) the existence of an illegal intent or actual monopoly or restraint must be determined on the basis of the general market for TBA in the Baltimore metropolitan area and Maryland generally; (4) Sinclair had neither the intent nor purpose to monopolize this general market; and (5) there was no conspiracy between Sherwood-Sinclair and Goodyear to restrain trade in this general TBA market (Appendix B to Petition for Writ of Certiorari, pp. 16a-17a).

The Court of Appeals for the Fourth Circuit reversed the District Court and remanded the case for a determination of damages. The court held that it was clear from the undisputed findings that an illegal tie-in arrangement existed and "that if a dealer desired to continue selling Sinclair gasoline under the lease and sales agreements, he had no choice but to buy, as well, substantial quantities of Goodyear TBA" (Appendix B to Petition for Writ of Certiorari, p. 37a). The Court of Appeals held further that it was not necessary that the restraint be expressly embodied in the written contracts or that the dealers be obligated to obtain all of the tied product from the seller (Appendix B to Petition for Writ of Certiorari, p. 41a). Finally, it held that the tying arrangment "affect(ed) a substantial part of commerce, solely for the defendant's economic benefit and not justified by the nature of the product. This is unreasonable per se * * *." (Appendix B

to Petition for Writ of Certiorari, p. 45a). It expressly rejected the contentions of Sinclair that it was necessary to produce voluminous economic data to show that the public generally has been injured (Appendix B to Petition for Writ of Certiorari, p. 47a).

ARGUMENT

I.

The Decision of the Court of Appeals is fully supported by the facts.

The petitioner's contentions are based in large part on erroneous conceptions of what are the governing facts. Throughout the Petition it treats the disposition of this case as depending on Sinclair's percentage of the sales of gasoline in Maryland and the percentage of service stations through which its gasoline is marketed, e.g. its question 1, and pages 8, 10, 11, 12 and 19 of the Petition, and it ignores completely the undisputed fact that Sinclair controlled the service stations through which the TBA was sold. This approach should be contrasted with its arguments in the court below, where it stated as its first point: "Appellant produced no evidence that Appellee required him or any other Sherwood-Sinclair dealer to handle Goodyear TBA *as a condition of holding his lease*" (Emphasis supplied).

The relevant market in this case was established by the agreements with Goodyear. This market consisted of the resellers (i.e., the service station dealers) which sold or proposed to sell Sinclair-Sherwood's petroleum products (R. 77, 80 and 84). As a practical matter this market consisted of the dealers who leased service stations from Sinclair-Sherwood, since dealers who controlled their own stations were not an important factor and if a dealer had

a big station, he was taken under a lease (See page 3, *supra*). This was the only market in which Sinclair agreed to help Goodyear and the only market in which it ever attempted to promote sales of TBA (R. 28).

It is self-evident that Sinclair had tremendous economic power over this market which consisted solely of persons who held their places of business under leases which Sinclair could terminate at the end of any year. Certainly this economic power was as great as the power of Northern Pacific Railway Company over the lands which it owned in fee simple. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 at 9 (1958). *Cf.* the opinion and findings of fact of the District Court in *Northern Pacific* which are quoted at length in Mr. Justice Harlan's dissenting opinion, 356 U.S. at 15. Sinclair's powers also were not significantly different from those of Standard Oil Company of California, which enabled it to secure illegal entire requirements contracts. *Standard Oil Company of California v. United States*, 337 U.S. 293 (1949).

The very fact that Goodyear was willing to pay substantial fees to Sinclair is compelling evidence of the existence of this economic power. The record is devoid of the slightest indication that either Sinclair or Sherwood had any special competence in either making or promoting sales of TBA, and the exact contrary is indicated by the undertakings of Goodyear in the tire and battery letter to provide salesmen, to cooperate in formulating a marketing plan and to educate Sinclair's sales organization (R. 82).

The undisputed facts fully justified the holding of the Court of Appeals that Sinclair had coercive economic power over the leased service stations which it farmed out to Goodyear for a price.

Secondly, the facts fully justified the holding of the Court of Appeals that this coercive economic power was actually exercised for the purpose of affecting purchases of Goodyear TBA. Quotas were established. Sinclair salesmen discussed the volume of Goodyear TBA purchases with the dealers. Records were kept as to Goodyear TBA purchases and were considered in connection with the annual renewals of the leases. When new leases were signed, the Sinclair sales representative would tell the prospective lessee of the identity of Sinclair and Goodyear, and endeavor to secure the initial order for Goodyear TBA. Lessees were requested to remove competitive signs, and reports were prepared as to competitive TBA which was carried by the service station dealers. At the dealer meetings the dealers were told that Sherwood wanted $1,000,000 of Goodyear TBA purchases, and that unless more Goodyear TBA was purchased, leases would be cancelled. These facts and others compelled the conclusion of the Court of Appeals that if a dealer wanted his lease continued, he had no choice but to buy substantial quantities of Goodyear TBA.

Finally, the record fully supports the conclusion that a "not insubstantial" amount of commerce was affected. It is not disputed that both the Goodyear TBA and the competitive TBA were imported into Maryland. It is also not disputed that the sales of Goodyear TBA alone to the Sinclair stations ranged from approximately $550,000 to over $1,000,000 per year, and averaged about $800,000 a year. The record further showed that the total reasonably expected volume of TBA purchases by the Sinclair service station dealers was not less than an average of about $1,500,000 a year, and might be much higher. Finally, the record showed that practically all of this business was done by the leased service station (*Supra*, pp. 3 and 8-9).

The facts thus establish beyond any genuine question that Sinclair had substantial economic power by virtue of its service station leases which it used as a leverage to induce the lessee-dealers to give Goodyear preference in the purchase of TBA, and that a "not insubstantial" amount of interstate commerce was affected. No more was required under *Northern Pacific* to demonstrate an illegal monopolization or restraint of trade. 356 U.S. at 7-8.

II.

The Opinion of the Court of Appeals Conforms to the Opinions of this Court.

In reaching its conclusion that Sinclair had violated the anti-trust laws the Court of Appeals followed and correctly applied the decisions of this Court, and properly ignored the efforts of Sinclair to lead it into "an incredibly complicated and prolonged economic investigation * * * in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken." *Northern Pacific Railway Co. v. United States, supra*, 356 U.S. at 5.

The present case involves the question of whether Sinclair undertook to use the economic power which it had over the service stations that it leased from year to year to dealers so as to affect the purchases of TBA by those dealers. These dealers constituted an appreciable segment of the market for TBA, and the monopolization or restraint of this segment is sufficient to establish a violation of the anti-trust laws. *United States v. Yellow Cab Co.*, 332 U.S. 218 and 226 (1947). See also the analysis of the decision of this Court in *International Salt Company v. United States*, 332 U.S. 392 (1947) which was made by this Court in *Standard Oil Company of California v. United States*,

337 U.S. 293 at 305 (1949), and was approved in *Northern Pacific*, *supra*, 356 U.S. at 9.

Under these last cited decisions any inquiry into the desirability of Sinclair gasoline or as to the nature of the location of its stations or as to competition to secure service stations or operators or the total annual volume of TBA sold in Maryland or elsewhere would have been quite irrelevant. The short of the matter is that the service stations existed, regardless of how or with what difficulty they were acquired, that they constituted a market through which a large volume of TBA was sold to the public, that this market was subject to Sinclair's control and that for a fee Sinclair undertook to exercise this control for the benefit of Goodyear.

The above cited decisions are in no way limited or affected by the recent decision of this Court in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). The *Tampa Electric* case involved an entire requirements contract. There was no evidence that the seller had any control over the buyer or that the contract was secured otherwise than in the ordinary course of business in competition with many hundreds of other vendors of coal. The restraint resulting from the contract was no different than the restraint which is inherent in every contract for the sale of goods, which, of necessity, takes the buyer out of the market for a time and prevents the seller's competitors from meeting those particular requirements of the buyer. Consequently, it was necessary to determine whether the restraint actually was unreasonable and operated to restrain competition in the relevant market and this Court found that the record did not contain any sufficient basis for such determination.

Northern Pacific and *International Salt* both establish that there is no necessity of showing the actual effect of the tying arrangements upon competition. 356 U.S. at 9. Consequently, there was no necessity of findings as to quantity of Goodyear TBA which was bought as a proximate result of Sinclair's coercive conduct. No such requirement is even suggested in the cited cases, and it is difficult to imagine of a legal rule which would more completely frustrate the policy of the anti-trust laws that competition rule the marts of trade.

There is an equal lack of merit in the contentions of the petitioner that there should have been findings as to how many of the stations which handled Sinclair products were leased from third parties and how many were independently owned. As shown at pages 3 and 8-9, *supra*, the evidence was that the independent stations were not an important factor in the marketing of TBA, and that the independent big stations were taken "off the market" (i.e., brought under control of Sinclair) by leases. The leased stations, whether one or many, constituted the market through which a large volume of TBA was sold, and the matter at issue was whether competition was restricted in this market. *Cf. Klor's Inc. v. Broadway Hale Stores, Inc.*, 358 U.S. 804 (1959), in which this Court condemned a boycott of a single store and *United States v. Yellow Cab Co., supra*, in which this Court condemned the monopolization of sales of taxicabs to six taxicab companies in four cities.

Petitioner asserts a number of times, e.g., at pages 13-15, that it is necessary to show foreclosure of a substantial segment of commerce, which it treats as meaning that there must be shown "the volume of Goodyear TBA which the Sinclair dealers purchased as the proximate result of supposedly unlawful sales pressure" (Petition, p. 13). There

is no justification for this contention in the decisions of this Court. *International Salt* speaks of foreclosure of "competitors from any substantial market." 332 U.S. at 396. *Northern Pacific* makes it clear that this means merely denying "competitors access to the fenced-off market on the same terms as the defendant." 356 U.S. at 12. It is merely necessary, under these decisions, that a "not insubstantial" amount of commerce be affected.

There is no basis for the assertion that the Court of Appeals held that the existence of sufficient economic power was not a proper subject of inquiry, and that it thereby devitalized the rule of *Northern Pacific*. As shown *supra* at page 9, there is a more than adequate showing that Sinclair had ample power to control its lessee-dealers' purchases of TBA. If petitioner desired to produce evidence to controvert the inferences which necessarily flowed from the facts that it had absolute control over the leased stations and that Goodyear was willing to pay it a fee for the use of this power, it should have done so in the District Court. This is particularly true since the District Court carefully pointed out to petitioner's trial counsel that the case would be governed by *Northern Pacific* and *United States v. General Motors Corporation*, 121 F. 2d 376 (C.C.A. 7, 1941). (Tr. 19 and 23-25; see Footnote 5, *supra*). This is equally true as to evidence of the alleged independence of the dealers, assuming that such evidence was relevant in view of the comments of this Court in *International Salt* and *Northern Pacific* as to allegations that the contracts were not enforced. *Cf. Jerrold Electronics Corp. v. United States*, 365 U.S. 567 (1961), affirming 187 F. Supp. 545 (E.D. Pa. 1960), where the evidence showed that in a number of instances restrictive agreements were not entered into because of customer objections.

Finally, the holding of the Court of Appeals that it was not necessary that the tie-in be exclusive is fully justified by *International Salt* and *Northern Pacific*. In both of those cases the defendants contended that the "rule of reason" should be applied because there was no absolute restraint and the customers were free to go to competitors who offered better prices. These contentions were rejected, since the concessions did not avoid the stifling effect on competition. 332 U.S. at 397; 356 U.S. at 12. *Cf. United States v. General Motors Corporation*, *supra*, where the evidence showed that in many, if not most, instances, there was no requirement that GMAC financing be used exclusively, and *Emich Motors Corporation v. General Motors Corporation*, 340 U.S. 558 at 562 (1951), which shows that Emich was required to use GMAC for 50% of his financing.

The decision of this Court in *Federal Trade Commission v. Sinclair Refining Company*, 261 U.S. 463 (1923) is not contrary to the holding of the Court of Appeals. This Court held in the cited case that a dealer who leased* the pumps could have as many pumps as he wished from as many suppliers as he wished or could buy his own pumps for a comparatively small sum, and that he could buy Sinclair's gasoline with or without the pumps. The only restriction on the dealer was that he could not use the pumps and tanks which he received without charge from Sinclair to store and dispense competitive products. This was no different than the so-called "free gifts" or "bonuses" that are frequently offered to induce customers to buy some product, and was a means of competing and not of restraining competition. The facts in the cited case were entirely different

* Actually, the word "lease" may be a misnomer. The sample contract printed in the margin provided for only a nominal consideration and the customer was simply furnished with free equipment for storing and dispensing Sinclair's gasoline. 261 U.S. at 469-470 and 475.

from the facts in the present case, where the ability of the lessee-dealer to retain his place of business was conditioned on his purchasing what Sinclair deemed to be an adequate quantity of Goodyear TBA.

The alleged fears of Sinclair that the Court of Appeals' decision will be construed as meaning that no trader of any size can safely do business with customers who habitually buy more than one product are groundless. As this Court pointed out in *Northern Pacific*, there is no tying problem where two products are offered as a unit at a single price if the buyer is free to take either product by itself. Footnote 4, 356 U.S. at 6. Naturally, where a trader chooses to condition the sale of one product on the purchase of another it runs the risk that a court may decide that "this host of tying arrangements is itself compelling evidence of * * * great power". 356 U.S. at 8. A trader also runs the risk that the willingness of a different concern to pay the trader a fee for the privilege of dealing with the trader's customers will be treated as evidence of the trader's power. Also, a trader who sets up a police system and makes threats and engages in other coercive activity runs the risk that this will be held to evidence an unwritten tying arrangement or effort to effect a monopoly. *Cf. Jerrold Electronics Corp. v. United States, supra.* But all of these risks flow not from the decision of the Court of Appeals alone, but from the decisions of this Court and from the many decisions of other courts condemning tying arrangements and coercive conduct and agreements, the only apparent purpose of which is to restrain commerce to a greater or lesser degree. A trader who adheres to the rules delineated by this Court has nothing to fear. But a trader who voluntarily chooses to skate on thin ice has no legitimate complaint if the ice breaks. *Cf. United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), where this Court found that the defen-

dant had exceeded the limited dispensation conferred by *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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